

Koll J. Jensen, WSBA #33342  
Attorney at Law  
1000 Second Avenue, Suite 3500  
Seattle, WA 98104  
Telephone (206) 792-6959

Attorney for Plaintiff Mark A. Brenner

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON**

MARK A. BRENNER, a single man,

Plaintiff,

v.

THE HANOVER INSURANCE  
GROUP, a Delaware Corporation,

Defendant.

No. 4:14-CV-05099-RMP

PLAINTIFF'S RESPONSE IN  
OPPOSITION TO DEFENDANT  
THE HANOVER INSURANCE  
GROUP'S MOTION AND  
MEMORANDUM OF LAW RE:  
MOTION FOR SUMMARY  
JUDGMENT DISMISSAL RE:  
PLAINTIFF'S CLAIMS

**I. INTRODUCTION**

Defendant The Hanover Insurance Group's Motion and Memorandum of  
Law Re: Motion for Summary Judgment Dismissal Re: Plaintiff's Claims  
("Hanover SJ Motion") ignores significant and critical material facts pertaining to

1 the claim at issue and inaccurately sets forth several of its own alleged material  
2 facts.

## 3 II. STATEMENT OF GENUINE MATERIAL ISSUES OF FACT

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5 Plaintiffs' identification of genuine material issues of fact precluding the entry  
6 of judgment pursuant to Defendant's Motion for Partial Summary Judgment are  
7 set forth separately as required by LR 56.1(b), filed concurrently with this  
8 Response. In particular, the repeated claims by The Hanover Insurance Group  
9 ("Hanover") that they never received any photographs is simply false and as such  
10 illustrates there are material questions of fact that should be answered by the  
11 finder of fact with regard to Plaintiff's claims. Relatedly, Hanover misrepresents  
12 the written statements of John Freand of Roto-Rooter, discounting those aspects  
13 of his description of the situation in a manner that places the interests of Hanover  
14 over those of its insured, Mr. Brenner. The existence of questions regarding the  
15 cause of the sewer pipe break demonstrate there are genuine issues of material  
16 fact that preclude the entry of Summary Judgment at this time. Hanover's motion  
17 is premature, as it was filed even before initial disclosures had been exchanged in  
18 this matter.  
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1 III. EVIDENCE RELIED UPON

2 1. Plaintiff's Statement of Genuine Issues of Material Fact Re Defendant The  
3 Hanover Insurance Group's Motion and Memorandum of Law Re: Motion for  
4 Summary Judgment Dismissal Re: Plaintiff's Claims;

6 2. Declaration of Mark A. Brenner in Opposition to Defendant The Hanover  
7 Insurance Group's Motion and Memorandum of Law Re: Motion for Summary  
8 Judgment Dismissal Re: Plaintiff's Claims and exhibits thereto;

10 3. Declaration of Koll J. Jensen in Opposition to Defendant The Hanover  
11 Insurance Group's Motion and Memorandum of Law Re: Motion for Summary  
12 Judgment Dismissal Re: Plaintiff's Claims and exhibits thereto; and,

14 4. The records and pleadings on file in this matter.

15 IV. AUTHORITY/ARGUMENT

16 The purpose of summary judgment is to avoid a useless trial or to avoid the  
17 submission of issues at trial, which can be speedily and inexpensively determined  
18 without trial. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

20 Summary judgment should be granted where the pleadings, depositions, answers  
21 to interrogatories, and admissions on file, together with the affidavits, if any, show  
22 that there is no genuine issue as to any material fact and the moving party is  
23 entitled to a judgment as a matter of law. Key Tronic Corp. v. Aetna, 124 Wn.2d  
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1 618, 624 (1994); CR 56. A fact is material if the outcome of the litigation  
2 depends upon it in whole or in part. Cameron v. Downs, 32 Wn. App. 875, 650  
3 P.2d 260 (1982); Ross v. Frank B. Hall & Co., 73 Wn. App. 630, 634, 870 P.2d  
4 1007 (1994). Once a party moving for summary judgment has made an initial  
5 showing that there is no genuine issue of material fact, the non-movant must  
6 demonstrate the existence of such an issue by setting forth specific facts which, if  
7 believed, would create a genuine issue of material fact. Brame v. St. Regis Paper  
8 Co., 97 Wn.2d 748, 649 P.2d 836 (1982). “Unsupported conclusory allegations  
9 are not sufficient to defeat summary judgment. Unsupported argumentative  
10 assertions are not sufficient to defeat summary judgment. Vacova Co. v. Ferrell,  
11 62 Wn. App. 386, 395, 814 P.2d 255 (1991) (internal citations omitted).

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15 In this case, it cannot be denied the Hanover’s SJ Motion omits material  
16 facts that are inconvenient to its case, and that should be considered by the fact  
17 finder as the outcome of this litigation depends upon a factual determination of  
18 this disputed and contested issues. In particular, Hanover attempts to sweep away  
19 the incredibly pertinent (and perhaps ultimately dispositive) question of what  
20 caused the pipe to break, and once this question is resolved, whether the insurance  
21 policy at issue provides coverage for the loss or not.  
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1 A. Hanover Completely Misrepresents the Fact that Photographs Were Provided  
 2 to Them.

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 4 Plaintiff provided Hanover with photographs taken by employees of Roto-  
 5 Rooter during the repair of the broken pipe. Declaration of Mark A. Brenner in  
 6 Opposition to Defendant The Hanover Insurance Group's Motion and  
 7 Memorandum of Law Re: Motion for Summary Judgment Dismissal Re:  
 8 Plaintiff's Claims ("Brenner Decl.") at ¶ 11, Exhibits A through G. Declaration of  
 9 Koll J. Jensen in Opposition to Defendant The Hanover Insurance Group's Motion  
 10 and Memorandum of Law Re: Motion for Summary Judgment Dismissal Re:  
 11 Plaintiff's Claims ("Jensen Decl.") at ¶¶2-3, Exhibits 1 and 2. Complaint at ¶¶  
 12 24-25. Answer at ¶¶ 24-25.

15 Despite receiving and reviewing the photographs, Hanover states at  
 16 multiple points that it never received any photographs. Hanover SJ Motion at  
 17 Page 2 (final paragraph) and Page 3 (continuing paragraph). See also Declaration  
 18 of Kathy Gleason in Support of Defendant The Hanover Insurance Group's  
 19 Motion and Memorandum of Law Re: Motion for Summary Judgment Dismissal  
 20 Re: Plaintiff's Claims ("Gleason Decl.") at ¶ 6. However, Ms. Gleason's letter to  
 21 Mr. Jensen on July 1, 2014 completely undermines this position wherein she states  
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1 “In regard to the above claim, we have reviewed your letter of June 26, 2014 as  
2 well as the accompanying photos”. Jensen Decl. at ¶ 3, Exhibit 2.

3  
4 Hanover reiterates this misrepresentation in its Statement of Material Facts  
5 in Support of its Motion for Summary Judgment Dismissal Re: Plaintiff’s Claims  
6 (“Hanover Material Facts”) at ¶ 10. See also Id. at ¶20. All of these claims that  
7 no photographs were provided serve to demolish Hanover’s repeated descriptions  
8 of the “allegedly” broken pipe. What’s more, Hanover’s dismissive use of the  
9 term “allegedly” would require that Mr. Brenner’s claim, Roto-Rooter’s  
10 explanation, the invoices generated, the photographs provided, and other  
11 communications are an elaborate conspiracy to fabricate a claim where none  
12 exists. Such a categorization of this situation should be rejected outright.  
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14  
15 Plaintiff’s previous production of the photographs to Hanover create a  
16 question of material fact as to whether Hanover’s claims that they were not given  
17 the opportunity to determine the cause of the pipe failure. Gleason Decl. at ¶ 14,  
18 Exhibit 8. Mr. Brenner provided what he could, and Hanover was not prejudiced  
19 in its investigation. This is especially true in light of the fact that the actual  
20 excavation of the damaged pipe disrupted the earth and material near and around  
21 the portion of pipe that was broken. Jensen Decl. at ¶2, Exhibit 1. A trier of fact  
22 should have the chance to review the photographs, hear testimony from the people  
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1 who worked on the repair, and testimony from one or more experts as to the  
2 potential and likely causes of the pipe breakage. As such, summary judgment is  
3 inappropriate at this time.  
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5 B. Hanover Misrepresents the Position of Roto-Rooter Regarding the Broken  
6 Pipe.

7 Hanover again mislead and/or represents the facts when it comes to the  
8 correspondence it received from Roto-Rooter. The correspondence from Roto-  
9 Rooter states, "...In our professional opinion the pipe had to have been damaged  
10 and pulled apart in some other way from an unknown source. This could have  
11 been done from other work being performed in proximity of this pipe such as  
12 other utilities being installed or even ground movement. The exact reason for  
13 the damage cannot be determined..." Gleason Decl. at ¶ 11, Exhibit 5  
14  
15 (emphasis added).  
16

17 Despite this very clear reading of the letter from Roto-Rooter, the Hanover  
18 SJ Motion contains incomplete or outright deceptive representations of its  
19 contents. See, for example, Hanover SJ Motion at page 4. ("Hanover re-evaluated  
20 its coverage position based upon Roto-Rooter's changed position that the pipe  
21 'could have been' damaged from work being performed in the proximity of the  
22 pipe or ground movement.") See also Hanover SJ Motion at page 5. ("Roto-  
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1 Rooter provided two separate theories of the cause of the loss, neither of which is  
2 covered under the Policy.”) Again at Hanover SJ Motion at page 16. (“In seeking  
3 coverage, Plaintiff relied upon two separate theories posited by Roto-Rooter as to  
4 the cause[s] of loss, neither of which is covered under the Policy.”) And again at  
5 Hanover SJ Motion pages 17-18. (“Roto-Rooter abandoned its original statement  
6 that seven feet of pipe was missing and speculated that Plaintiff’s loss was caused  
7 by either (1) work being performed in proximity the alleged broken pipe such as  
8 other utilities being installed or (2) ground movement.”)

11 In the very next sentence, Hanover concedes that its (selective)  
12 reliance upon Roto-Rooter’s letter is misguided with regard to how the pipe  
13 actually broke. “Roto-Rooter’s **unsupported opinion** that the underground pipe  
14 was damaged [broken] ‘by work being performed in proximity of the alleged  
15 broken underground pipe such as other utilities being installed’ is excluded by the  
16 *Negligent Work* Exclusion in Hanover’s Policy.” Hanover SJ Motion at page 18  
17 (emphasis added). In none of these representations does Hanover acknowledge  
18 Roto-Rooter’s conclusion that “the exact reason for the damage cannot be  
19 determined.” Gleason Decl. at ¶ 11, Exhibit 5.

22 All of these statements by Hanover in its Motion for SJ are misleading, as  
23 they ignore the photographs that were shared with Ms. Gleason. Indeed, Hanover  
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1 inadvertently (presumably) underscores the importance of the photographs it was  
2 provided and chose to ignore, and then falsely claimed to have never received.

3 “Such evidence (photographs and other physical evidence) **is particularly**  
4 **important** in this matter...” Hanover Motion for SJ at page 20 (emphasis added,  
5 and parenthetical phrase added for clarity).

6  
7 Hanover’s misrepresentations of Roto-Rooter’s complete explanation, its  
8 admission that Roto-Rooter’s opinion is “unfounded,” and its tacit admission that  
9 the cause of the break *is not known*, all militate to the material facts of this case be  
10 determined at trial or after further discovery has taken place. For additional  
11 reliance on these misrepresentations and devaluation of Roto-Rooter’s  
12 explanation, see Hanover’s Material Facts at ¶13 (“The invoice is silent as to the  
13 cause of the underground alleged underground pipe break.”) citing Gleason Decl.  
14 at ¶7. Also of note are ¶¶ 11, 17, 18, 20, and 21.

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17 C. It is a Question of Material Fact as to How the Pipe Was Damaged and  
18 Whether the Insurance Policy Provides Coverage.  
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20 Hanover’s rationale and reasoning for its SJ Motion utterly fails once it is  
21 understood that the cause of the pipe breakage at this point is unknown, that it is  
22 unclear if any of the insurance policy’s exclusions apply, and whether any of the  
23 policy’s endorsements or other provisions provide coverage for the loss. Some of  
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1 these potentially applicable exclusions and endorsements are set forth in Hanover  
2 SJ Motion at pages 15-20, as well as Hanover Material Facts at ¶¶ 23-24.

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4 There are other provisions of the insurance policy that may be determined  
5 to mandate coverage for the loss, just as there are provisions that may require a  
6 denial of coverage. Declaration of Martin J. Pujolar in Support of Defendant The  
7 Hanover Insurance Group's Motion for Summary Judgment Dismissal Re:  
8 Plaintiff's Claims at ¶4, Exhibit 3. However, the legal outcome of this case  
9 cannot determined as a matter of law until as-yet unknown or undetermined facts  
10 are established through discovery or trial.  
11

#### 12 V. CONCLUSION

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14 For the reasons set forth above, and because further discovery or a trial are  
15 needed determine the multiple and significant issue of material fact in this matter,  
16 the Hanover SJ Motion should be denied. A proposed Order will be provided to  
17 the Court prior to the hearing date.  
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2 DATED this 22nd day of December, 2014.  
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5  
6 KOLL J. JENSEN, ATTORNEY AT LAW  
7

8 /s/ Koll J. Jensen

9 Koll J. Jensen, WSBA #33342

10 Attorney at Law

11 1000 Second Avenue, Suite 3500

12 Seattle, WA 98104

13 koll@kolljensen.com

14 (206) 792-6959 tel

15 (888) 600-5331 fax

16 Attorney for Plaintiff Mark A. Brenner  
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